In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 856

U.S.A.C. TRANSPORT, INC., APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The court dismissed appellant's action brought to set aside orders of the Interstate Commerce Commission entered in two proceedings (*Dealers Transit, Inc.* and *Baggett Transportation Company*) in which it held that appellant's com-

764-753—65

mon carrier certificate authorizing the transportation of "aircraft and aircraft parts" did not authorize the transportation of missiles and missile parts. The facts underlying the Commission determinations are as follows:

In the *Dealers Transit* proceeding (86 M.C.C. 327), appellant and four other motor carriers filed applications for authority to transport missiles and missile parts. Appellant's application was accompanied by a motion to dismiss on the ground that such transportation was already authorized under its present certificate. After full administrative proceedings, the Commission concluded that appellant's authority to transport aircraft did not cover missiles. The Commission noted that, under the ordinary meaning of the words, missiles are not considered to be "aircraft" (J.A. 21a).[1] The Commission discussed the physical characteristics of the two classes of commodities, observing that "aircraft are ordinarily considered to be craft capable of transporting humans which can be navigated in the air and which are supported by the buoyancy of their structures or the dynamic action of air against their surfaces," while missiles are "craft designed to operate in space as well as in the air, the navigation of which is limited to 'some guidance which terminates in flight' and which are not supported by the buoyancy of their structures or the dynamic action of air against their surfaces" (J.S. 21a). The Commission also stated

[1] The Commission denied appellant's application for authority to transport the commodities, but issued a certificate therefor to another of the applicants (J.S. 23a).

that there was "clearly" no intent to include missiles within the phrase "airplane or aircraft" when the certificate was originally issued (*ibid.*).

In the *Baggett Transportation* case (88 M.C.C. 3), the Commission reaffirmed its ruling in *Dealers Transit* and held that appellant's certificate did not authorize the transportation of certain jet thrust units used in missiles.

The three-judge district court unanimously upheld the Commission rulings (J.S. 1a–9a, 235 F. Supp. 689). It concluded that the Commission's interpretation of the certificate was not clearly erroneous, and that appellant was accorded a fair hearing (J.S. 7a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The district court, upon a full review of the record, correctly held that the Commission's interpretation of the commodity description in the particular certificate of public convenience and necessity was reasonable and that appellant had received a fair hearing.[2]

[2] Appellant suggests that plenary consideration of this appeal is warranted because the same Commission orders are under review in the United States District Court for the Southern District of Florida, Civil Action No. 523-62-M, *Leonard Bros. Transfer Co.* v. *United States*. However, proceedings in the *Leonard* case (which concerns the validity of the Commission's interpretation of the term "airplane" as used in Leonard's certificates) were stayed by the court pending the final decision of the Commission in a related proceeding, Docket No. MC-19227 (Sub.-Nos. 44 and 54), *Leonard Bros. Transfer, Inc., Petition for Correction of Certificate*. By orders dated October 26, 1964, and February 8, 1965, the Commission has modified Leonard's certificates so as to authorize the transportation of missile parts, thus substantially mooting the court proceeding.

1. The interpretation of a certificate issued by the Commission is primarily a question for that agency, *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, and, unless such interpretation is clearly erroneous, it is controlling on the courts, *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. As the district court held (J.S. 5a–8a), the Commission's ruling that the words "aircraft and aircraft parts" in appellant's certificate do not include missiles and missile parts followed both common usage and the dictionary meaning of those terms, and therefore was plainly reasonable. Contrary to appellant's contention (J.S. 2, 3, 8, 9), the Commission, in construing such terms in its certificates, is not required to follow technical definitions or to give controlling weight to the phraseology employed by officials in the aerospace industry. Indeed, unless the words of a commodity description are either ambiguous or words of art—and the words in appellant's certificate are neither—their "ordinary meaning * * * is determinative" (*Nelson, supra,* at 558).

2. The appellant's claim that the Commission denied it a fair hearing similarly is without substance. This Court has recognized the propriety of the procedure utilized by appellant in *Dealers Transit*—the filing of an application for additional operating authority coupled with a motion to dismiss on the ground that an existing certificate embraces the authority sought—as a well-established method of securing a definitive interpretation of a carrier's operating authority. *Schenley Corp.* v. *United States*, 326 U.S. 432, 436; *Roadway Express, Inc.* v. *United States*, 213 F. Supp.

868, 870 (D. Del.), affirmed, 375 U.S. 12. As the court below pointed out (J.S. 8a), all the parties recognized from the commencement of the *Dealers Transit* proceeding that the Commission would there determine whether, as used in appellant's certificate, "aircraft" includes "missiles." Appellant could have presented in that proceeding any evidence it had dealing with the meaning of either of those terms. The procedures the Commission followed in deciding the issue of certificate interpretation that appellant raised accorded appellant a fair hearing.

CONCLUSION

The district court's decision is clearly correct and no substantial question is presented by this appeal. It is respectfully submitted that the judgment should be affirmed.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
JERRY Z. PRUZANSKY,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
BETTY JO CHRISTIAN,
Attorney,
Interstate Commerce Commission.

FEBRUARY, 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965